

REMARKS

Applicant has carefully studied the Office Action of April 8, 2004 and offers the following remarks in response to accompany the above amendments.

Before addressing the rejections, Applicant provides a brief summary of the present invention and the references cited so that the remarks are considered in the proper context. The present invention relates to billing computer network users for the service that is actually provided to them. That is, a computer network user may contract for a certain quality of service (QoS1) from the computer network. The quality of service is primarily concerned with packet loss, but may also include bandwidth available, resource availability, and the like. The present system monitors the service actually received by the customer and determines if the service received by the customer matches the service for which the customer contracted. If the quality of service actually received by the customer (QoS2) is different from the quality of service for which the customer has contracted (QoS1), the present invention allows the customer to be billed for the quality of service actually received (QoS2).

In contrast, the primary reference, Gallant et al. is a cellular telephone system that bills people according to the cell in which the customer is located. The billing is strictly based on geographic location rather than a particular quality of service. Admittedly, different services such as call waiting, call forwarding, and the like may be provided in different locales, but these services are not "quality of service" issues as that term is understood by someone skilled in the art.

Applicant herein amends claims 1 and 21 to recite that the characteristic is related to a quality of service associated with the networking transmission service. Similarly, claim 11 is amended to recite that the metrics are related to a quality of service.

Claims 1-4, 6-9, 11-15, 17-19, and 21 were rejected under 35 U.S.C. § 102(e) as being anticipated by Gallant et al. (hereinafter "Gallant"). Applicant respectfully traverses. For the Patent Office to establish anticipation, the reference must show each and every claim element. Further, the elements of the reference must be arranged as claimed. MPEP § 2131.

As amended, claims 1, 11, and 21 recite the quality of service aspect of the present invention. As explained above, Gallant is not concerned with billing based on quality of service. Instead, Gallant bills based on physical location of the cellular subscriber. See, for example, Gallant col. 5, lines 25-45 that describes a first level of service when in the local calling area, a

second level of service when outside the home calling area and inside the local calling area, and a third level of service when outside the local calling area, as well as col. 5, lines 46-55 that describe billing at three levels based on the level of service provided. Since the levels of service are independent of the quality of service, the reference does not show a recited claim element and does not anticipate the independent claims. Since the independent claims are not anticipated, the dependent claims cannot be anticipated. Applicant requests withdrawal of the § 102(e) rejection of claims 1-4, 6-9, 11-15, 17-19, and 21 on this basis.

Applicant further traverses the rejection on the basis that the Patent Office has improperly construed a term. While the Patent Office is entitled to give claim terms their broadest reasonable interpretation, that interpretation is circumscribed by two things. First, as noted, the interpretation must be reasonable. Second, the reasonableness of the interpretation is determined from the viewpoint of someone of ordinary skill in the art at the time of the filing of the application in question. Applicant respectfully submits that as of March 25, 1999 (Applicant's filing date), someone of ordinary skill in the art did not consider a cellular telephone network to be a computer network as recited in the claims. While recent advances in cellular phones suggest that cellular phones are computers, and a network of cellular phones is a computer network, at the time of filing, this connection between cellular phones and computers had not been established. Specifically, the packet based communication nature of a computer network was impractical in March 1999, and thus, cellular networks were not considered to be computer networks. If the Patent Office disagrees, Applicant requests the Patent Office provide contemporaneous proof that someone of ordinary skill in the art, as of March 1999, equated cellular networks with computer networks. Absent such evidence, Gallant does not show a computer network as recited in the claims, and Gallant does not anticipate the claims.

Claims 5, 10, 16, and 20 were rejected under 35 U.S.C. § 103 as being unpatentable over Gallant. Applicant respectfully traverses. When the Patent Office creates an obviousness rejection over a modified reference (either modified from its original state or modified by combining the reference with another reference), the Patent Office must do two things. First, the Patent Office must articulate a motivation for the modification, and second, the Patent Office must support this modification with actual evidence. *In re Dembiczak*, 175 F.3d 994, 999 (Fed. Cir. 1999). Furthermore, to establish obviousness, the Patent Office must show where each and

every claim element is located. MPEP § 2143.03. If the Patent Office cannot establish obviousness, then Applicant is entitled to a patent.

With respect to claims 5 and 16, the Patent Office takes Official Notice that determining packet loss in a computer network is well known. The Patent Office further opines that it would have been obvious to modify Gallant to include a packet detector to generate accounting records to determine packet loss because it is an efficient manner to determine performance of the network in regards to service for which a subscriber is billed. Assuming, *arguendo*, that determining packet loss in a computer network was well known in March 1999, Applicant notes that there is no evidence to support the notion that measuring packet loss is an efficient manner to determine performance of a network in regards to service for which a subscriber is billed. Rather, such a position appears to have been impermissibly lifted from Applicant's disclosure. Applicant further traverses this modification on the basis that it results in an inoperable system. Specifically, the cellular system of Gallant does not operate using packets, and thus, a packet monitor in Gallant's system would report no useful information. To arrive at the claimed invention, Gallant would first have to be modified into a packet based network, which would render Gallant unsuitable for use as a cellular system. Such a modification is improper. M.P.E.P. § 2413.01. Therefore, since the Patent Office has provided an improper modification to the reference, the rejection is improper and the claims are allowable.

With respect to claims 10 and 20, the Patent Office takes Official Notice that accounting policies in computer networks are well known. The Patent Office further opines that it would have been obvious to modify Gallant such that the policies are deployed at the source and destination IP address, protocol, or destination port level because it provides an efficient system to monitor a subscriber's service usage for billing procedures by tracking characteristics related to the subscriber's equipment. Assuming, *arguendo*, that accounting policies in computer networks are well known, the Patent Office still has not provided any evidence (as is required by the Federal Circuit) to support the motivation to modify Gallant. As such, the modification is improper on this basis, and the claims are allowable. Applicant further traverses on the basis that, as explained above, modifying Gallant into a packet based system renders Gallant unsuitable for its intended purpose as a cellular network. The Patent Office has not provided any evidence that cellular networks were interchangeable with packet networks in March 1999 and as such, the modification is improper. Since the modification is improper, the claims are allowable.

Applicant requests reconsideration of the rejection in light of the amendments and remarks presented herein. Gallant does not, and cannot, show a packet based network that is concerned with measuring quality of service values and billing based thereon. Applicant earnestly solicits claim allowance at the Examiner's earliest convenience.

Respectfully submitted,

WITHROW & TERRANOVA, P.L.L.C.

By: 

Benjamin S. Withrow
Registration No. 40,876
P.O. Box 1287
Cary, NC 27512
Telephone: (919) 654-4520

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